Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ALPHEUS RAY BROKAW,

Petitioner

v.

QUALCOMM, INC.,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Rule (7)(b)(1).** May a court rule that an employee's prima facie case of age discrimination is insufficient before trial without any motion notice of that defense by either the court or employer [(as required by Federal Rule of Civil Procedure (7)(b)(1)] where the court stated that the employee was replying to the employer's reply brief, which would be impossible?

II. **Hearsay evidence.** In a disparate treatment age discrimination case, is hearsay evidence that a replacement was doing the job after lay off sufficient to avoid summary judgment when, in addition, the employee was asked by his supervisor to train his replacement, he trained him, was thanked by his supervisor for training him, the replacement was doing the job at lay off, the job was necessary for continuance of that area of the company's work, and that area of work continued?

III. **Corporate admission.** To avoid summary judgment, does a prima facie case of age discrimination require that a corporate official admit that the employee was replaced since it could be argued that the laid off employee could not have personal knowledge after he was laid off?

IV. **Data disclosure.** In a large reduction in force, is an employer required to provide more data than just age and title of workers to a laid off employee to enable the employee to determine whether discrimination occurred?

V. **Statistical evidence.** Petitioner's court-accepted expert found that an employee over the age of 57 in the large reduction in force was 10 times more likely to be laid off than a younger worker, and that discrimination was likely by the odds of about 3.5 billion to one. May statistical evidence alone infer age discrimination to avoid summary judgment where the Fifth Circuit allows the inference but the Ninth Circuit refuses the inference?

VI. **California Code of Regulations § 260.140.41(f).** Petitioner, a non-college graduate, was solicited by telephone with the promise of substantial stock from his pension-paying job to work for non-pension paying Respondent. After starting work Respondent unilaterally prepared an alleged unconscionable vesting schedule (which Petitioner did not remember signing) which did not vest any stock until after 2 years and which vested 40% of the stock more than 5 years and 2 months later. May a trial court disregard **California Code of Regulations § 260.140.41(f)** which requires that employee stock options vest at least 20% per year, simply because no court has commented on the regulation?

VII. **California Government Code § 12941.1**. Under California's Fair Employment and Housing Act, does laying off an employee, while maintaining less qualified employees, six months before $400,000 in stock vests constitute age discrimination in light of California **Government Code § 12941.1** which includes salary differential as proof of age discrimination?

VIII. May an employer grant a benefit to any employee contingent upon future employment, and then terminate the employee to deprive him of the benefit?

PARTIES TO THE PROCEEDING

Petitioner
Alpheus Ray Brokaw

Respondent
Qualcomm, Incorporated

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OPINIONS BELOW

On December 21, 2004, the Ninth Circuit Court of Appeals issued its final unpublished opinion (Case No. 04-55198) affirming the district court's ruling of dismissal by summary judgment. A timely petition for rehearing en banc was denied on March 18, 2005 (Pet. App. at A1).

JURISDICTION

The certiorari jurisdiction of this Court is invoked in conformity with 28 U.S.C § 1254(1).

RELEVANT PROVISIONS

Federal Rule of Civil Procedure 7(b)(1) supports Petitioner's position that the appeals court erred in affirming the decision that Petitioner did not have a prima facie case of age discrimination, because that particular motion was not made or noticed to Petitioner. The controlling portion of Rule 7(b)(1) is set forth below:

> **Rule 7(b)(1)** An application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Federal Rule of Civil Procedure 56(c) does not seem to exclude hearsay evidence in the context of motions for summary judgment. Rule 56(c) is set forth below:

Rule 56. Motions for Summary Judgment

56(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

California Gov. Code § 12941.1 provides that salary may be the basis for age discrimination. The controlling portion of 12941.1 is set forth below:

California Gov. Code § 12941.1

". . . The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group

> and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the states' statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. . ."

California Corporations Code § 25102 (o) states that the terms of any employee option plan or agreement shall comply with California Code of Regulations Section 260.140.41, and Corp. Code § 25102 (o)'s pertinent part follows:

> **California Corporations Code § 25102 (o).**
> The following transactions are exempted from the provisions of Section 25110:
>
> "(o) An offer or sale of any security issued by a corporation or limited liability company pursuant to a purchase plan or agreement, or issued pursuant to an option plan or agreement, where the security at the time of issuance or grant is exempt from registration under the Securities Act of 1933, as amended, pursuant to Rule 701 adopted pursuant to that act (17 C.F.R. 230.701), the provisions of which are hereby incorporated by reference into this section, provided that (1) the terms of any purchase plan or agreement

shall comply with Sections 260.140.42, 260.140.45, and 260.140.46 of Title 10 of the California Code of Regulations, **(2) the terms of any option plan or agreement shall comply with Sections 260.140.41, 260.140.45, and 260.140.46 of Title 10 of the California Code of Regulations, and (3) the issuer files a notice of transaction in accordance with rules adopted by the commissioner no later than 30 days after the initial issuance of any security under that plan, accompanied by a filing fee as prescribed by subdivision (y) of Section 25608** (emphasis added). . ."

California Code of Regulations § 260.140.41 provides that employee stock options shall vest at least 20% per year, and the pertinent part follows:

California Code of Regulations § 260.140.41

". . . **(f)** The right to exercise at the rate of at least 20% per year over 5 years from the date the option is granted. . ."

STATEMENT

A. Introduction

This case raises important questions in wrongful termination/age discrimination cases as to the sufficiency of evidence an employee must present to avoid summary judgment.

B. Material Facts and Procedural Summary

In 1995 Petitioner (Mr. Brokaw) was working as a senior design engineer at TRW when he was solicited by Mr. Weigel, the manager of mechanical engineering at Respondent (Qualcomm). Mr. Weigel promised substantial stock to leave the pension job at TRW. Mr. Brokaw said "I'll give you 5 good years if you give me the stock." The manager said, "That should not be a problem. We are all getting it." He attended the employee Christmas party in December, 1995.

Mr. Brokaw relied on the promise and began work at Qualcomm as a senior design engineer on January 29, 1996. Before that date he had never been told that he would lose his stock if he were laid off. Qualcomm defends by Qualcomm's Attorney Connaughton's declaration that Qualcomm prepared a document on Feb. 2, 1996, claiming that all options would be lost upon termination. Feb. 2, 1996, is after Mr. Brokaw started work.

Qualcomm unilaterally prepared a schedule that stated that Mr. Brokaw would not get any stock for over 2 years after starting work and would not get 40% of his stock until over 5 years and 2 months later. Petitioner's Complaint argued that California Code of Regulations §260.140.41(f) states that options must vest at not less than 20% per year and therefore, Qualcomm's entire restrictive schedule was illegal. Petitioner also argued that California Corporation's Code § 25102(o) requires compliance with CCR § 260.140.41. Petitioner argued that Qualcomm's vesting schedule of 40% of the stock more than 5 years and 2 months after starting work is unconscionable.

Mr. Brokaw did a great job for 4 ½ years and was laid off July 7, 2000. His unvested options were worth between $400,000 and $1,000,000 depending on market date.

Qualcomm profited by Mr. Brokaw's work and then kept the stock's appreciation of the promised benefit by lay off to deprive the subservient employee of the benefit, according to Mr. Brokaw.

Mr. Brokaw was asked to train Paul Repp, a younger worker, to replace him. Mr. Brokaw trained Mr. Repp who was performing his job when Mr. Brokaw left. In Mr. Brokaw's unit there were 440 engineers, of which 46 were laid off. The entire unit had only 17 engineers over the age of 57, and Qualcomm laid off 13 of them. Qualcomm retained 390 of the engineers under 57 years old. Therefore, an engineer in the Global Star Unit had a 10 times greater chance of being laid off if over the age of 57. A math expert declared that laying off 13 of the 17 workers over 57 years old was statistically unfair by Qualcomm by 3.1 billion to 1. Qualcomm said the reason Mr. Brokaw was that Mr. Brokaw's newer supervisor, Mr. Ellis, selected Mr. Brokaw for lay off as being unqualified and unneeded. However, an E-mail from the same supervisor, Mr. Ellis, stated that Mr. Brokaw was the only one who could do the job. Mr. Ellis said they were laying off the older workers and higher-salaried workers to save money. Qualcomm did not compare Mr. Brokaw's merits with either unit-wide or plant-wide engineers who were retained. In the plant were hundreds of other engineers who were allowed to keep their jobs. Mr. Brokaw never received a written notice of lay-off.

After Mr. Brokaw left he was told by several workers that his replacement was still doing Mr. Brokaw's job, which Mr. Brokaw declared in the trial court.

Twenty days before Mr. Brokaw started work, 2200 stock options were authorized to Mr. Brokaw by a vice-president and by Human Resources. The trial court refused to accept the authorization in Brokaw's favor in stating that Mr. Brokaw could not have known about that document before starting work (Pet. App. at C 10, C 11).

Qualcomm made multiple motions to dismiss, motions for summary judgment, motions to nullify Brokaw's deposition answers after two depositions, and other motions. The trial court dismissed several claims by motion to dismiss, and granted summary judgment as to the remaining claims.

REASONS FOR GRANTING THE WRIT

As shown below, the reasons for granting this writ include settling conflicts between this Court and also between courts's of appeal, and correcting errors that conflict with this Court's decisions.

A. Rule (7)(b)(1). A writ should be granted to correct the procedural error of summarily dismissing Petitioner's case without notice.

Federal Rule of Civil Procedure (7)(b)(1)] states that motions must state grounds with particularity. Petitioner's Complaints and Declarations alleged a prima facie case of age discrimination. Neither the trial nor Respondent made a particular motion to dismiss Petitioner's prima facie case. The purpose of the particularity requirement of Rule 7 is to afford notice of the grounds and prayer to both the court and to the opposing party with a meaningful opportunity to respond [*Registration Control Systems v. Compusystems, Inc.*, 922 F. 2d 805, 807 (Fed. Cir. 1990)].

However, as easily seen at Pet. App. at C 14, the trial Court, affirmed by the Ninth Circuit, stated that the employee was replying to the employer's reply brief, which would be impossible, because a reply brief is prepared after an opposition brief. Thus, Rule (7)(b)(1) was violated.

B. Hearsay evidence. This Court could assist age discrimination litigants on a national level by clarifying the type of evidence that can be used to avoid summary judgment. The affirmed trial court ruled that Petitioner has not proven that he was replaced, partly because Respondent did not admit replacement [Pet. App. at C 14 (Petitioner's witness lacked identity and authority to speak for Qualcomm)]. Brokaw did declare that his job was needed, he was the only person who could do his job, the work continued, and that for the work to continue, someone would have to be trained by him.

Federal Rule of Civil Procedure 56(c), cited above under "Relevant Provisions," refers to affidavits and that the respondent could have as few as 10 days to respond to a motion for summary judgment. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 152 (2000), this Court held that summary judgment is prohibited if a plaintiff has created an inference of age discrimination. *Reeves* was a Rule 50 dismissal as a matter of law after the case had been heard by a jury. Throughout *Reeves*, this Court referred to "sufficient evidence" and "inferences" as relating to prima facie cases of discrimination.[1] Here, Petitioner alleged that

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[1] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000): (The court must review all of the evidence in the record, cf., *e.g.*, *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986), drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence.)

after Petitioner was laid off, employees told him that they observed that Petitioner had been replaced. Hearsay evidence that is reasonably likely to be introduced at trial should be sufficient to avoid summary judgment. Petitioner also alleged that he was asked by his supervisor to train his replacement, he trained him, was thanked by his supervisor for training him, the replacement was doing the job at lay off, the job was necessary for continuance of that area of the company's work, and that area of work continued. The affirmed trial court held that Petitioner had not shown that he had been replaced.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 154 (2000), Justice Ginsburg realized that some cases might require a clearer definition of sufficient evidence in prima facie cases.[2] She referred to *McDonnell Douglas*

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[2] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 154, (2000), *Justice Ginsburg*, concurring:

> "The Court today holds that an employment discrimination plaintiff *may* survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case," as that term is used in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973); and second, evidence from which a rational fact finder could conclude that the employer's proffered explanation for its actions was false. Because the Court of Appeals in this case plainly, and erroneously, required the plaintiff to offer some evidence beyond those two categories, no broader holding is necessary to support reversal.
>
> I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion

Corp. v. *Green,* 411 U. S. 792, 802 (1973) as to the type of evidence that might be sufficient. However, *McDonnell Douglas* is race discrimination case that did not involve replacing an older worker.

If the employer is a corporation (although here apparently Respondent did not certify that it was a corporation until appeal), the employee cannot simply solicit current employees for evidence due to the attorney-client privilege. Therefore, forcing an employee to depose witnesses, during a summary judgment motion, for every fact that the employee could foresee a trial court's concern is too great a burden.

In an age discrimination case, a complaint need only state a brief statement of "claims upon which relief can be granted" under the ADEA [*Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 514, 515 (2002)]. But if an employee follows *Swierkiewicz* and only alleges that age discrimination occurred, then upon a summary judgment motion, the subservient employee is then forced to declare all elements of the claim and to quickly guess which corporate employees have information that can be quickly obtained by admission in a deposition, even if discovery is allowed at that time. Therefore, if reasonable hearsay evidence is not allowed to avoid summary judgment, an employer with superior bargaining power will have little reason to respect discovery procedures, and will be encouraged to hide elements of a claim that the employer knows exist, but which the employer believes is not yet in the hands of the employee.

At the pleading stage, hearsay evidence is direct

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for judgment as a matter of law. I anticipate that such circumstances will be uncommon."

evidence. Should this Court view hearsay evidence a part of a circumstantial evidence scheme, circumstantial evidence is accepted in all discrimination cases [(*Desert Palace, Inc. v Costa*, 539 U. S. 90, 100 (2003)].

C. Corporate admission. A writ should be granted in this age discrimination case because the lower courts seemed to require a corporate admission that the employee was replaced, which conflicts with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 154 (2000).

As stated in the above discussion about hearsay evidence, the Ninth Circuit, by affirmance, has implied that a prima facie case of age discrimination seems to require an admission by the employer that an employee was replaced since the employee could not view his job after lay off (Pet. App. at C 14).

This evidentiary burden is contradictory to the above *Reeves* case which prohibits summary judgment if the plaintiff has created an inference of age discrimination.

D. Data disclosure. A writ should be granted to determine whether an employer is required to provide more data than just age and title of workers in a large reduction of force to a laid off employee to enable the employee to determine whether discrimination occurred. A writ should also be granted because the lower courts refused to consider Brokaw's following discrimination evidence because they were not specifically alleged in the First Amended Complaint: 1) evidence of being discriminated against with Qualcomm's illegal severance release, and 2) Brokaw's claim of insufficient data (Pet. App. at C 17, fn. 5). Requiring more than a brief statement of the

claim in a complaint violates this Courts holding in *Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 514 (2002).

This is a matter of national significance because employers in this large country may periodically have reductions in force. The Ninth Circuit committed error in affirming the trial court, which held that Petitioner's statistics were insufficient when Petitioner used the only information provided by Qualcomm after requesting more information by interrogatory (Pet. App. at C 16).

Some of the requirements of the data that must be provided are found in the ADEA at 29 U.S.C. 626. Sections 626(f)(1)(H)(i) and (ii) require that an individual must be given information about the other workers as to their eligibility factors for the program, ages, and job classifications. Qualcomm did not compare Brokaw with other engineers in his unit as shown by Mr. Ellis' statement that he selected Petitioner for lay off among the few engineers under the Supervisor Ellis[3] (Pet. Apps. at C 14, C 15).

In *Wastak v. Lehigh Valley Health Network*, 333 F.3d 120, 134, fn. 9 (3rd. Cir. 2003), the court stated that 29 U.S.C. Sec. 626(f)(1) sets only minimum standards and that more is required in some cases.

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[3] In *EEOC v. Regents of the Univ. of Wis. Sys.*, 288 F. 3d 296, 302, 304 (7th Cir. 2002), the court found that 29 U.S.C. 623(a)(1) was inferred violated where the employer replaced older employees, no written justification for termination was prepared until after termination, and the evaluation was prepared without soliciting managers opinions or performing a formal evaluation. None of these duties were done in Brokaw's case which is a reckless disregard of age discrimination laws.

E. Statistical evidence. A writ should be granted to settle and clarify whether statistical evidence alone may infer age discrimination to avoid summary judgment where the Fifth Circuit allows the inference but the Ninth Circuit sometimes refuses the inference. Petitioner's court-accepted expert found that an employee over the age of 57 in the large reduction in force was 10 times more likely to be laid off than a younger worker, and that discrimination was likely by the odds of about 3.5 billion to one.[4]

In the present case, the trial court stated cited *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283 (9th Cir. 2000) in stating that statistics, standing alone, will not raise a triable issue of fact regarding pretext unless they show a stark pattern of discrimination unexplainable on grounds other than

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[4] In addition to overwhelming statistical evidence, Brokaw also produced an E-mail from his supervisor, Mr. Ellis, where Mr. Ellis seems to be arguing with his superiors that Brokaw shouldn't be replaced since he is the only one who can do the job. This refutes the finding that Mr. Ellis said Brokaw was not needed. Brokaw also alleged and declared that he was asked to train his replacement, the company continued after he left, and that only someone trained by him could do his job which was required for the company to continue. In addition, Brokaw declared and alleged that Qualcomm's stock vesting schedule was illegal as not vesting at least 20% per year per California Code of Regulations § 260.141.41. He also alleged California Gov. Code 12941.1 which allows salary differential as proof of age discrimination and as discussed in *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, fn. 29 (Cal. 2000). The trial court refused the Regulation claim and ignored the Gov. Code § 12941.1 claim.

Brokaw also alleged and declared that his severance offer was illegal as prohibiting future claims, awarding attorney's fees to a prevailing party upon suit, not providing valuable consideration to which Brokaw would not otherwise be entitled, paying similar workers a higher severance amount, and paying younger workers a "legal" severance while depriving Brokaw of severance due to an illegal severance waiver.

age (Pet. App. at C 16). However, Petitioner had used age and title, the only statistics that Qualcomm would provide. The trial court also cited *Pottenger v. Potlatch Corp.*,329 F.3d 740, 747 (9th Cir. 2003), but that case stated that it might have ruled for Pottenger if Pottenger had access to only 2 variables (*Pottenger*, Id. at 748). Both *Coleman* and *Pottenger* are distinguished because those employees added all employees into the statistics, regardless of job duties.

The Fifth Circuit stated that statistics alone will suffice to prove age discrimination [*Walther v. Lone Star Gas Co.*, 952 F. 2d 119, 125 (5th Cir. 1992)]. Therefore, now the U. S. Supreme Court should clarify between various circuit courts as to what type of statistical evidence is sufficient to avoid a summary judgment by an employer with superior bargaining and litigation power.

F. California Code of Regulations § 260.140.41(f). This Writ should be granted to determine whether federal courts may disregard state regulations simply because no court has commented on the regulation.

Petitioner, a non-college graduate, was solicited by telephone with the promise of substantial stock from his pension-paying job to work for non-pension paying Respondent. After starting work Respondent unilaterally prepared an alleged unconscionable vesting schedule (which Petitioner did not remember signing) which did not vest any stock until after 2 years and which vested 40% of the stock more than 5 years and 2 months later. **California Code of Regulations § 260.140.41(f)** which requires that employee stock options vest at least 20% per year. The affirmed trial court simply dismissed Petitioner's claim by stating that Petitioner had not stated any authority. The trial court did state

that the regulation did not apply to public corporations, but did not give any authority for that ruling.

Unless a state law is unconstitutional, federal courts are bound to abide by state laws [*Adderley v. Florida,* 385 U.S. 39, 46 (1966). Therefore, the affirmed trial court's refusal to uphold the 20%/year vesting rule in **California Code of Regulations § 260.140.41(f)** conflicts with the principle of respecting state laws as set forth by this Court.

G. California Government Code § 12941.1.

This Writ should be granted to determine whether the California Supreme Court has stated that California Government Code § 12941.1 includes salary differential as proof of age discrimination, but which the affirmed trial court here has ignored. Here, Petitioner was laid off six months before $400,000 of his stock vested (according to Respondent's unilateral and unconscionable schedule). Petitioner also declared that his supervisor told him "They were laying off the older and higher-paid workers."

California Government Code § 12941.1 includes salary differential as proof of age discrimination.

Salary motivation is actionable under FEHA (*Cal. Gov't Code Sec. 12941.1*). In *Guz v. Bechtel Nat'l Inc.*, 24 Cal.4th 317, fn. 29 (2000), the Court noted that because Plaintiff had not argued *Cal. Gov't Code Sec. 12941.1*, the Court said it would not consider it. Unless a state law is unconstitutional, federal courts are bound to abide by state laws [*Adderley v. Florida,* 385 U.S. 39, 46 (1966). Therefore, the affirmed trial court's refusal to uphold California's Fair Employment and Housing Act conflicts with the principle of respecting state laws as set forth by the U. S. Supreme Court.

CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant this petition for writ of certiorari, reverse the decisions of the United States Court of Appeals for the Ninth Circuit, and hold that summary judgment is not proper under the factual and legal circumstances stated above.

Respectfully submitted,

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